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No. 00-1314

IN THE

Supreme Court of the United States

Sylvia Rodriguez, Individually And On Behalf Of Her Minor Child, Les Andrew Kelly,

Petitioner,

v.

Marjorie McLoughlin, Individually And As Executive Director Of Cardinal McCloskey Children's And Family Services, Barbara McMurray, Individually And As Foster Boarding Home Director Of Cardinal McCloskey Children's And Family Services, Cardinal McCloskey Children's And Family Services, New York City Department Social Services, New York City Child Welfare Administration, And The City Of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief In Opposition For Respondents Marjorie McLoughlin, Barbara McMurray and Cardinal McCloskey Children's And Family Services

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QUESTIONS PRESENTED

Whether a foster mother and foster child develop a constitutional liberty interest similar to that of natural or adoptive families, prior to lawful adoption, based upon emotional attachment, and where a contract vests custody of the child with a foster care agency until the day of legal adoption; and where in fact, an emergency removal, which was held to be justified, was carried out after the foster mother left two foster children in the home unsupervised by any adult for more than two hours, in violation of the applicable rules and regulations.

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STATUTES OR OTHER PROVISIONS INVOLVED

It is respectfully submitted as this lawsuit involves a so-called "emergency removal", many, if not most, of the New York State statutes cited in petitioner's *certiorari* petition are not directly relevant. Rather, co-respondent respectfully suggests that N.Y. Comp. Codes R. & Regs. tit. 18 § 444.5(c)(3) is of greater relevance. This provision provides that foster children under 10 years must never be left without adult supervision.

Additionally, relevant is the New York State Social Services Law § 383(2) which states:

> The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

Additionally, New York Social Services Law § 386 supports the right of the inspection of the foster home and periodic visitation of the foster child by the agency (McCloskey). Social Services Law § 400 specifically authorizes the removal of children from a foster home by the authorized agent of the state. The scope of authority and responsibility vested with foster agencies in New York is illustrated by Social Services Law § 398(9), which authorizes a social services official to conduct an emergency removal of a child from his *natural* or *adoptive* home if the child is endangered.

PRELIMINARY STATEMENT

This brief is respectfully submitted in opposition to the plaintiff-petitioner's petition for a writ of *certiorari* on behalf of defendants-respondents MARJORIE McLOUGHLIN, individually and as Executive Director of Cardinal McCloskey Children's and Family Services, BARBARA McMURRAY, individually and as Foster Boarding Home Director of Cardinal McCloskey Children's and Family Services, and CARDINAL McCLOSKEY CHILDREN'S AND FAMILY SERVICES (hereinafter "co-respondents").

Respondents respectfully suggest that the decision below, by the United States Court of Appeals for the Second Circuit, was correctly decided, and petitioner's application should be denied. The decision below correctly found that the City and its authorized agency have ultimate responsibility for critical child care decisions and that an extension of a constitutional liberty interest between Sylvia Rodriguez and Andrew was not warranted.

ISSUES PRESENTED

This Court is called upon by petitioner to overturn the well-reasoned decision of the United States Court of Appeals, Second Circuit, which held that plaintiff-petitioner did not have a constitutionally protected "liberty interest" prior to the time when the foster parent became endowed with the full parental rights of an adoptive parent. Attempting to elevate the liberty interest of pre-adoptive foster families, petitioner ignores the "contract care provider" nature of the relationship between foster parents and foster children in New York. Petitioner further misconstrues New York State statutes in suggesting that they independently create a constitutionally

protected "liberty interest". Petitioner's viewpoint collides with the proper authority of the actual legal guardian of a child during the foster care process, in making decisions in the best interest of the child. In doing so, petitioner would carve an awkward exception to well-settled constitutional law by placing an overlay of ill-defined federal requirements over state law requirements that have already been found constitutional by the Supreme Court in *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 97 S. Ct. 2094 (1977) (hereinafter "*OFFER*").

Finally, it is respectfully submitted that petitioner's arguments that the Second Circuit opinion has a "wide ranging social impact", (see petition, p. 8) and that it conflicts with other decisions of the Supreme Court and of other circuits, are similarly misplaced.

STATEMENT OF FACTS

Les Andrew Kelly ("Andrew"), was born on March 15, 1990. His mother abandoned him in the hospital. He was taken into foster care by the City of New York and, through Cardinal McClorkey Children's and Family Services, placed in Sylvia Rodriguez' home when he was thirteen days old. He remained there until the events giving rise to this lawsuit. In June 1993, the parental rights of Andrew's biological mother were terminated by the New York Family Court, and Andrew's guardianship and custody were transferred to the Commissioner of Social Services of the City of New York and McCloskey, as an authorized agent.

In August 1993, Sylvia Rodriguez and McCloskey executed an "Adoptive Placement Agreement". In that agreement Sylvia Rodriguez acknowledged the following:

> • [I am] taking this child with the intention of adoption although [I] understand that legal custody remains with Cardinal McCloskey and that this adoptive placement agreement remains in effect until the date of legal adoption.
>
> • The legal adoption will take place after both Cardinal McCloskey and [I] agree that it is in the child's best interest.

Sylvia Rodriguez also agreed that

> • If at any time prior to legal adoption it is determined by the agency or by [me] that the child should be removed from [my] home, [I] will cooperate with the agency in carrying this out in a way that serves the best interest of the child in the judgment of the agency.

Petitioner represents that "by March 1994 [the month of Andrew's removal] all adoption papers had been filed for Andrew's adoption, and the City, CWA, the foster care agency in Ms. Rodriguez were all awaiting the finalization of the adoption process". In fact, the unrebutted trial testimony revealed that the subsidy necessary for adoption had not yet been processed, and it was premature to even retain an attorney to finalize the application to the court for legal adoption. Thus, plaintiff/ petitioner's claim that all the "paperwork" had been filed is misleading. The adoption was not finalized for approximately a year after the foster mother and child were reunited in June of 1994.

On March 18, 1994, respondent McCloskey, as an authorized agent for the City of New York removed two foster

children in its charge, including Andrew, from the foster home of petitioner Sylvia Rodriguez . The removal was made based on unrebutted facts that Sylvia Rodriguez had left the two foster care infants (aged three and four years), solely in the care of Ms. Rodriguez' emotionally handicapped twelve-year-old grandson for a period of at least two hours during which no adult was present to supervise the children. Sylvia Rodriguez thus violated 18 N.Y.C.R.R., § 444.5(c)(3), which provides that a foster parent is "never [to] leave children under the age of 10 years alone without competent adult supervision". The removal caused an inexorable sequence of events mandated by the state and city regulatory schemes and designed to ensure the safety of foster children following incidents of suspected neglect. The emergency removal of the foster infants by McCloskey social worker was found proper and lawful by the trial court below.[1]

At trial, there was unrebutted evidence that on the actual day of the removal, Sylvia Rodriguez was notified by respondent Barbara McMurray via telephone about the removal. The unrebutted trial evidence also showed that Ms. Rodriguez first contacted an attorney to help her with this matter one week after the removal, and made an application for a hearing within two weeks of the emergency removal.

Following the emergency removal Ms. Rodriguez successfully pursued her remedy to return Andrew.

1. There is an important distinction between a planned removal of a foster child and an emergency removal like the one at issue in this case. A planned removal has requirements for pre-removal notice, a possible pre-removal investigation, and possible pre-removal hearing. An emergency removal, due to its urgency, has no pre-action requirement under state law and by necessity the investigation and any hearing come after the removal.

The second foster child, Thomas Green, was not preferred for adoption and remained in another foster home where he was eventually adopted. The petitioners were reunited on or about July 13, 1994 and Ms. Rodriguez pursued adoption which was finalized a year later. Thereafter, this suit was commenced.

Originally, respondents had moved pursuant to Rule 12(b)(6) to dismiss. Magistrate Ronald L. Ellis recommended that the motion to dismiss be granted. Petitioner objected and the district court held that there was a liberty interest which had been violated by respondents. The case then went to trial on the issue of damages only, as the district court had essentially made a liability finding. The second circuit reversed.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

It is respectfully suggested that petitioner in this action does not have a constitutionally protected liberty interest prior to actual adoption. Moreover, the Second Circuit opinion is not in conflict with the "*OFFER*" decision. Nor does the Second Circuit opinion conflict with Supreme Court precedent, or with decisions of other lower courts in a manner which mandates this Court granting *certiorari*.

Petitioner claims (at p.7 of the petition) that the opinion below establishes "that every foster family in New York must live in fear that it may be torn apart and denied a timely and meaningful opportunity to contest that involuntary separation". In fact, the trial court expressly found that the

agency acted in the best interest of the children by removing them from the home after they had been left unsupervised by any adult for more than two hours[2].

The *OFFER* Decision

In *OFFER*, foster parents who felt they had a vested interest in their foster children because they had lived together a year or more brought a lawsuit based on 42 U.S.C. § 1983. 431 U.S. at 818-19, 97 S. Ct. at 2096-97. The suit challenged the constitutionality of the New York regulatory scheme that allowed for removal of foster children at the discretion of foster care agencies. *Id.* In a decision delivered by Justice Brennan, the Court surveyed the very statutes at issue in this case regarding the authority to remove foster children, and the applicable notice requirements, and found them constitutionally sound. 431 U.S. at 818-38, 97 S. Ct. at 2097-2106.

The Court noted that any call for reform of the foster care system was properly directed to the Legislature, and that the emotional ties so vigorously asserted were actually derived in the first instance from the impersonal source of state law and binding contractual arrangements. 431 U.S. at

2. Petitioner somewhat disingenuously states in the petition (at p.6) that "Ms. Rodriguez did not contest the validity of the removal at trial or on appeal" In fact, petitioner's original complaint alleged that the removal was improper, which the trial court completely rejected. Petitioner in fact did not appeal from that pre-trial determination. Additionally, petitioner makes no mention of the fact that a second child, also under the age of five, was removed at the same time as Les Andrew Kelly. That child was not adopted by Sylvia Rodriguez. It would appear that any "emotional attachment" that arose with respect to that other child (also residing with the foster mother since shortly after birth) was of less consequence to petitioner.

838, 845, 97 S. Ct. at 2106, 2110. In a holding that has guided bench and bar alike, the Court emphasized that the expectations of entitlement of foster parents depended on governing state law. 431 U.S. at 845-6, 97 S. Ct. at 2210. The Court held: "In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional 'liberty' in the foster family." 431 U.S. at 846, 97 S. Ct. at 2110.

The holdings, express and implied, that are signaled by *OFFER* have been interpreted by lower courts with convincing uniformity: the rights of foster parents are severely limited and should not hamstring the governing state and municipal authorities in the exercise of their guardian role. Express language within the concurring opinion of *OFFER* is clear on the subject. Justice Stewart, writing the concurring opinion joined by Justices Burger and Rehnquist, stated: "I would squarely hold that the interests asserted by the appellees are not a kind that the Due Process Clause of the Fourteenth Amendment protects." 431 U.S. at 857-8, 97 S. Ct. at 2116-17.

Petitioner incorrectly suggests that by virtue of the fact that the statement cited above is contained in the concurring opinion, a majority of the Court held for the reverse proposition, namely, that pre-adoptive foster parents had broad Due Process constitutional rights. A reading of *OFFER*, however, does not bear this interpretation out.

Decisions After *OFFER*

Numerous courts since *OFFER* provide a majority view that there is no substantial liberty interest between foster parent and foster child. Following the Fifth Circuit decision in *Drummond v. Fulton County Dept. of Family*, 563 F.2d 1200 (5th Cir. 1977), *cert. den'd*, 437 U.S. 910 (1978), which was decided shortly after *OFFER*, a dozen courts have ruled consistent with the verbatim language of the concurring opinion in *OFFER* that is no substantial liberty interest in a foster family scenario. As the Fifth Circuit held in *Drummond:*

> True liberty rights do not flow from state law, which can be repealed by action of the legislature . . . The very fact that the relationship before us is a creature of state law . . . demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it.

Drummond, 563 F.2d at 1207

The holding that there is no constitutionally protected liberty interest invested in foster families has been repeated in numerous circuits. *See Wildauer v. Frederick County*, 993 F. 2d 369, 373 (4th Cir. 1993) (no constitutionally protected liberty interest in favor of foster parent without custody of foster child); *Renfro v. Cuyahoga County Dept. of Human Services*, 884 F.2d 943, 944 (6th Cir. 1989) (no due process liberty interest, right of appeal, or right of to written explanation arising under Ohio law following removal of foster child after six year residence with foster family); *Sherrard v. Owens*, 644 F.2d 542, 543 (6th Cir. 1981),

cert. den'd, 454 U.S. 828, 102 S. Ct. 120 (1981) (no constitutionally protected liberty interest in foster family relationship); *Kyess v. County Dept. of Public Welfare of Tippecanoe County*, 600 F.2d 693, 694 (7th Cir. 1979) (no constitutional liberty interest after substantial period of foster care placement – Indiana law examined); *Backlund v. Barnhart*, 778 F.2d 1386, 1389-90 (9th Cir. 1985) (no recognized liberty or property interest in foster child – Washington law examined); *Spielman v. Hildebrand*, 873 F.2d 1377, 1384-85 (10th Cir. 1989) (liberty interest between unrelated parents and children limited by state law giving rise to that relationship). Other courts have reached the same conclusion: *Dewees v. Stevenson*, 779 F. Supp. 25 (E.D. Pa. 1991); *Engstrom v. State*, 461 N.W.2d 309, 318-319 (Iowa 1990).

Petitioner cites the *Brown* case; this case was specifically based on the California regulatory structure. *Brown v. County of San Joaquin*, 601 F. Supp. 653 (E.D. Cal. 1985) In fact, two higher court decisions by the Ninth Circuit encompassing California support the opposite conclusion: that there is no substantial liberty interest between foster parents and foster children. See *Backlund*, 778 F. 2d at 1386; *Gibson v. Merced County Dept. of Human Resources*, 799 F. 2d 582 (9th Cir. 1986). The fact that *Backlund* deals with the Washington State statutory scheme underscores the fact that an evaluation of the California scheme is not relevant to the issues presently before the Court that depend necessarily on New York law. *See OFFER*, 431 U.S. at 846-47, 97 S. Ct. at 2110.

The New York State Court cases cited by petitioner ignore the United State Supreme Court's ruling in *OFFER* that any due process rights arising out of state law are limited and to be strictly construed. By contrast, expansive

definitions of "family" in interpreting, for example, rent stabilization laws (included in the cases cited by petitioner) have no precedential value in the context of this action. Thus, cases such as *Braschi v. Stahl Associates, Co.*, 74 N.Y. 2d 201, 544 N.Y.S. 2d 784 (Ct. App. 1989)[4] cited by petitioner are not applicable.

Petitioner argues that a starting point for determining whether a liberty interest exist is whether a foster family is "sufficiently like a natural family". This ignores the clear mandates of *OFFER*. Significantly, this approach also ignores that Ms. Rodriguez' "family" included another child, also under the age of five, living in this house since shortly after birth, but who Ms. Rodriguez elected not to adopt. Additionally, petitioner ignores the contractual nature of the foster care relationship.

Petitioner claims that the Second Circuit's opinion in Rodriguez is in direct conflict with the Third Circuit in *McLoughlin v. Perinskey* 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989). A close reading of *McLoughlin*, in fact, suggests the opposite. *McLoughlin* dealt with an improper removal. The relevant Pennsylvania state statute in *McLoughlin* explicitly mandated that foster parents shall be notified in writing of their right to appeal at least 15 days *prior* to the relocation of the child. Furthermore, should the foster parent file said appeal, Pennsylvania statutes mandate that "the child must remain in the foster family home pending a decision on the appeal". *McLoughlin* 693 F. Supp. at 326. The foster child at issue in *McLoughlin* was removed

4. *Braschi* held that "since rent control laws are remedial in nature and designed to promote the public good, their provision should be interpreted broadly to effectuate their purpose" *Braschi*, 544 N.Y.S. 2d at 787.

without any prior notice or opportunity for the foster parents to file an appeal which would stay any removal of the child. By contrast, in this action, the propriety of the removal is simply not an issue. Nor do the relevant New York State statutes contain explicit, mandatory and relevant dictates that were violated.[5]

The Tenth Circuit case of *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989) also does not support plaintiff's position. *Spielman*, like *McLaughlin*, dealt with an improper removal. The Tenth Circuit in *Spielman* specifically did not decide if the pre-adoptive status of the relationship at issue was a sufficient liberty interest to afford some level of due process protection. Rather, the court held that as the plaintiff received a hearing, any such constitutional right, if it existed, was not violated by defendant's conduct. *Spielman*, 873 F.2d at 1385.

Petitioners also rely upon the holding in *Thelan v. Catholic Social Services*, 691 F. Supp. 1179 (E.D. Wis. 1988). Petitioners failed to note the actual holding of *Thelan*, in which the court specifically held that the pre-adoptive plaintiffs had no constitutional entitlement to a pre-removal hearing. *Thelan*, 691 F. Supp. at 1180. The *Thelan* court decided the case on this "narrow issue" and expressly stated that no determination is made as to the merits of the other issues raised. *Id*, at 1180, 1182. Furthermore, the approach taken by the *Thelan* court tempers any liberty interest created by a foster parent's expectation of permanency with the all important relevant state statutes. The court specifically found

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5. It should be noted additionally that the relevant issue in *McLoughlin* was decided by the district court and not addressed by the appellate court.

in *Thelan* that any constitutionally protected liberty interest does not exceed the interest established by Wisconsin State Law. *Id.* at 1185.

Petitioner's Reliance Upon Statutes and Regulations

It is respectfully submitted that petitioner's reliance upon various upon New York State statutes and regulations which, they claim, mandates a so-called "liberty" interest, is misplaced. As discussed by the Second Circuit opinion below, *OFFER* and other cases dictate that "liberty interests" created solely by application of state law are narrow, limited, and context-specific. As held in *Kentucky Department of Correction v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904 (1989). "The most common manner in which a state creates a liberty interest is by establishing substantive predicates to govern official decisionmaking. . . and further, by mandating the outcome to be reached upon a finding that a relevant criteria have been met". *Id.* at 490 U.S. at 462. Additionally, to create a liberty interest, a statute or regulation must "contain explicitly mandatory language, i.e. specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow" *Id.* at 490 U.S. at 463.

Importantly, the Court pointed out that the search for specific substantive directives to the decisionmaker must be context-specific.

> It should be obvious that the mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory

> language that expressly requires the decisionmaker to apply whether [the plaintiff] may be deprived of the particular interest in question.

Kentucky Department of Corrections v. Thompson, 490 U.S. at 464 n.4 (emphases in original).

Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293 (1995) provides further guidance, insofar as the Court recognized that the relevant constitutional interpretation must be grounded in common sense. "Our decision today only abandons an approach that in practice is difficult to administer which produces anomalous results." *Sandin*, 515 U.S. at 483, n.5. As discussed by the Second Circuit, below, *Sandin* does not disturb the principle stated in *Kentucky Dept. of Corrections v. Thompson* that no "liberty interest" has been created by state law where there is no explicit mandatory language.

With the above in mind, petitioner's efforts to transmute the statutes cited into a "liberty interest" in this specific action must fail. None of these provisions contains the type of *relevant* language that mandates specific defined conduct which would give rise to a liberty interest. Petitioner cites claimed "mandatory language" in two provisions. First, they cite to section 421.2(b) in that efforts to remove a child shall be undertaken only when it is clearly established that such action is in the child's best interest. Second, petitioner claims "mandatory language" in the provision of section 383-c(9), which provides that a foster parent who has had continuous care of a child for more than twelve months shall be entitled to intervene in any proceeding involving the child.

The first provision deals exclusively with a removal, the propriety of which is not an issue here. (The district court specifically declined to second guess McCloskey's decision to remove the two children when they were left without proper adult supervision, and the decision was not contested by petitioners.) Agencies such as McCloskey have unfettered authority to remove foster children in emergency situations and are given authority to do so without advance notice to the foster parents. See N.Y. Soc. Serv. Law § 383(2); N.Y. Comp. Codes R. & Regs. tit. 18 § 443.5(a). Furthermore, failure by the agency to intervene in such an emergency situation, would subject the children to risk of potential harm and potentially violate the infant's due process rights, and subject the agency to a lawsuit for failing to safeguard the infants.[6]

The second example claimed as "mandatory language" pertains to intervention by a foster parent. Clearly, intervention during the actual physical removal would be inappropriate, would frustrate the very purpose of a removal, and is inapplicable in this case.[7] Post-removal, there is no question that Sylvia Rodriguez, in fact, did intervene with request to one of the two children and ended up legally adopting this child. Thus, the provision cited by petitioner cannot independently generate a "liberty interest" in this case.

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6. An Illinois District Court has held that a foster infant has a due process right to be free from placement in a foster care environment where the necessary degree of supervision is lacking. *Taahira W. by McCord-Sally v. Travis*, 908 F. Supp. 533 (N.D. Ill. 1995).

7. The petition, in fact, states at page 6 that "Ms. Rodriguez did not contest the validity of the removal at trial or on appeal".

Petitioner criticizes the decision below for failing to hold that § 421.2(b) gives rise to a liberty interest (see Petition p. 24). In addition to the rationale as set forth in the decision below, two other points deserve mention. First, the cited regulation deals solely with removal, which in this action was held to be proper. It does not deal with continued visitation or return after a hearing. Second, the language of the statute does not set forth a specific, mandatory course of action which was then violated, but rather is a vague general provision dealing with the best interest of the child. A simple "best interest of the child" reference in the statutes cannot, by itself, form the predicate for a "liberty interest" derived from state law.

Other rules and regulations cited by petitioner are simply not relevant to the issues in this action. By contrast, should petitioner's approach to the creation of a "liberty" interest be followed (based upon the vague or inapplicable regulations cited) then virtually every foster parent in the State of New York would have a liberty interest, a result clearly not in accord with either *OFFER* or common sense.

Petitioner urges that the lower court opinion in the case is the "death knell" to any and all due process liberty interests for foster care families. (See Petition p.7). Nothing in the lower court's opinion indicates such a sweeping result. Rather, using the approach suggested by petitioner, virtually every foster care family would be able to claim some sort of "liberty interest" based upon the statutes cited by petitioner. Statutes establishing procedural requirements, for example, to intervene in a custody proceeding, are far removed from the specific facts in this action. Yet if these statutes are

allowed to create a "liberty interest" in this case any intelligent administration of the foster care system will be thrown into complete chaos.[8]

The Example of Thomas Green Reveals that Petitioner Advocates for an Unworkable Standard

Historically, foster families have not enjoyed the liberty interest urged. What Petitioner seeks from this Court is to carve an exception in the case law and settled precedents. In order to propose that the Rodriguez family has an enhanced liberty interest relative to another foster family in New York, petitioners argue that certain factors in their family circumstance set Andrew apart from other foster children. (See Petition at i, ii). Each of the factors that petitioners offer is based upon an expectation that temporary foster care placement will become permanent once lawful adoption is completed. Although all may aspire toward adoption, none of these factors promise future adoption, and in many foster care homes the expectation of adoption fails to culminate in lawful adoption. Petitioners argue that certain foster families should have a liberty interest like that of adoptive families because the foster families hold the strands of what may lead to adoption in the future. But it cannot follow that all foster homes with same factors as the Rodriguez home deserve an enhanced liberty interest. The particular circumstances in each home differ, despite petitioner's efforts to present the characteristics as uniform.

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8. Although this case does not create the problem of the so-called "collision of rights" between a natural parent and an adoptive parent, a decision in petitioner's favor would create that very collision in a huge number of cases in which the natural parent, an agency, and a foster parent all were held to have some type of liberty interest.

Thomas Green is the most obvious and striking example of a foster child who lacks a liberty interest but still shares the characteristics found in the Rodriguez/Kelly home situation. Thomas Green also had been a foster child in Sylvia Rodriguez's house since shortly after his birth. As trial testimony showed, Thomas Green's adoption by Sylvia Rodriguez was arranged and the path for adoption was cleared by the termination of the natural parent's rights. He lived in the Rodriguez home well in excess of the minimum required 12 months. He lived like a foster sibling to Les Andrew Kelly for almost all of his life until both children were removed from the Rodriguez foster home on March 18, 1994. The removal of Thomas Green and Andrew was conducted by the same agency personnel, and for the same reasons. The distinction between Thomas Green and Andrew is that ultimately Sylvia Rodriguez did not prefer Thomas Green for adoption. After the removal of both foster children, Ms. Rodriguez pressed for the return of Andrew, but declined to pursue the return of Thomas Green (Thomas Green was removed to another foster home and was subsequently adopted there).

The petition makes no mention of Thomas Green, but his example shows the practical unworkablility of Petitioner's arguments. Thomas Green's family situation with Sylvia Rodriguez on March 18, 1994 had the same factors that petitioner urges must give rise to a liberty interest for Andrew. Thomas Green reveals a fundamental disjunct in petitioner's argument that translates into an impossible standard for field workers, who must identify which foster children in the New York system enjoy a liberty interest and which do not. Petitioners argument would require Venton Montplaisir (the Agency worker who conducted the removal on March 18, 1994) to make an on-site calculation of the difference

between the rights of Les Andrew Kelly and those of Thomas Green. It is respectfully submitted that this standard is not only unwieldy, but unworkable.

Petitioner's Arguments Regarding Andrew's "Independent Liberty Interest" are without Merit

Petitioner claims that the decision below failed to consider Andrew's own liberty interest, as distinct from that of Ms. Rodriguez. Petitioner states, to that end, that "Andrew's interest in maintaining the integrity and familial relationship, and the effect on him in an abrupt separation from the only family he has ever known, is no less powerful because of his lack of a biological tie with Ms. Rodriguez."

Petitioner cites no valid authority for the proposition that this equitable argument by itself, creates a constitutionally protected liberty interest. Additionally, petitioner overlooks the fact that another child, Thomas Green, was present in the Rodriguez household from birth or shortly thereafter and was also removed at the same time as Andrew. Surely petitioner does not mean to suggest that Thomas Green has a constitutional liberty interest, as Ms. Rodriguez made no efforts whatsoever to secure his return. Yet from the child's perspective (as is urged by petitioner) there is no difference between 4 year old Andrew and 3 year old Thomas Green.

Additionally, numerous Federal Courts have set out the limit of the constitution rights of foster children within the state foster care system. *See Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992); *K.H. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (no constitutional right to stable foster care environment); *Wendy H. v. City of Philadelphia*, 849 F. Supp. 367 (E.D. Penn. 1994).

Ultimate Responsibility for the Foster Child is Reposed with the City and the Agency

The Second Circuit decision places the ultimate responsibility for the safety and welfare of New York foster children exactly where it should be B with the legal guardians of the children. As the Petition notes at p.25, the Adoption Placement Agreement specifically memorialized that lawful custody of the foster child remained with the Agency until the completion of adoption (this custody requirement is also a matter of statute at N.Y. Soc. Serv. Law § 383(2)). As the statutes show, and as trial testimony explored, layers of government regulation and reporting requirements govern the foster care agency, but Ms. Rodriguez is beholden only to the terms of the placement agreement. If and when legal adoption occurs, then the foster children have a new legal guardian and the ultimate responsibility shifts to that new guardian.

Where New York law affords long-term foster parents with certain adoption preferences, basic fairness and sensible practicalities are served. Petitioner argues to extend the premise of long-term foster parent preference so that the foster parents gain a vote in the parenting decision that belongs with the lawful guardian. Petitioner alludes to "grievous wrongs" against foster children that may be made by the state and the agency in their determination of what is best for the foster child; these "wrongs" are actually differences of opinion between what the foster parent believes is best for the child and what the legal guardian believes is best.

Petitioners argue for a constitutional platform from which to advance their view of child care upon the lawful guardian. The basis of petitioner's argument is simply that family bonding that always accompanies the hope of an adoption prospect. When adoption is finalized then the adoptive parent has the ultimate responsibility for the child, which cannot be interfered with by the former guardians, the state and the agency. For the same sound reasons, and based on the same legal precedents, the Court should not allow the foster parent to claim early right of partial guardianship during an unfinished and undecided adoption process. The foster parent is not ultimately responsible for the child, but would be given leeway to hamstring the guardian in its exercise of discretion. Where the agency's authority to act is compromised, then that compromise comes at the risk of harm to the child.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court not grant *certiorari* in this matter.

Respectfully submitted,

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